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IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

POLSON LOGGING COMPANY, a corporation,
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRAHAM J. DIMOND, co-partners doing business under the name and style of NEUMEYER & DIMOND,
Defendants in Error.

No. 2584.

UPON REVIEW FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendants in Error

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Alaska Printing Co., **Seattle's Brief Printers,** Alaska Bldg. Main 7398

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BRIEF OF RESPONDENTS IN ERROR.

STATEMENT OF THE CASE.

The statement by plaintiff in error is his conclusions from the pleadings and is in no sense a statement of the facts. A fair statement of the controversy as presented to the jury and the trial court is as follows:

The plaintiff co-partnership sued the defendant corporation for the sale and delivery of a carload of steel of the agreed and reasonable value of $3,895.39, and interest. The kind, quantities and description of the steel were fully described in an exhibit attached to the complaint. (R. pp. 3-6.)

Defendant's answer denied all the allegations of the complaint except it admitted its corporate capacity and its refusal to pay, and affirmatively alleged:

(1) That the order for the steel was procured by fraud; and

(2) Was given by an agent without authority. (R. pp. 6-10.)

These matters were denied in the reply. (R. p. 10.)

September 11, 1912, M. C. Sulcove, travelling salesman for Neumeyer & Dimond, received from J. C. Shaw, of Polson Logging Co., an order for steel. (R. p. 19.) This order was signed, "Polson Logging Company, by J. C. Shaw." (Pl. Ex. No. 1.)

After May 14, 1913, the following information was at hand:

February 6, 1913, the steel was shipped and February 18, 1913, Polson Logging Company received from defendants in error invoices for the steel. (R. p. 64, Pl. Ex. No. 4.) These invoices gave the quantity, size, description and weight (Def. Ex. "F"), approximate weight per foot, approximate length, and approximate length per bar of each and every bar, the total weight, and the value of the shipment (Def. Ex. "E").

Polson Logging Company, on receipt of the invoices, took the following position:

(1) Denied giving the order, or any order of any kind. (Pl. Exs. No. 2, No. 3 and No. 4.)

(2) Accused Neumeyer & Dimond of forging the signature of its agent, Shaw. (Pl. Ex. No. 7.)

(3) Charged Neumeyer & Dimond with fraud in securing the order. (Pl. Ex. No. 7, R. p. 121.)

(4) Said Shaw had no authority to buy (Def. Ex. "J," R. p. 184), and in its Answer alleged he

was only the bookkeeper. (R. pp. 8 and 9.)

(5) Complained of the sizes. (Def. Ex. "J.")

(6) Made no objection to the lengths or the weights.

Before any objections were made the steel had been shipped and the greater part arrived in Hoquiam, Washington, on the 11th day of March, 1913 (Pl. Ex. 11, Def. Ex. "I"), and the balance on May 14th, 1913 (Pl. Ex. No. 12, Pl. Ex. No. 13).

It was refused on account of not having been ordered. The freight bill, marked Def. Exhibit "A," shows on its face, *"Refused a/c not ordered."* (R. p. 131.) A letter of the Northern Pacific Railway Company addressed to Neumeyer & Dimond, dated May 10th, 1913, reads: *"This shipment arrived at Hoquiam on March 11, and same was refused by consignee on account they claim not ordered."* (Def-Ex. "I," R. p. 183.)

September, 1913, William E. Neumeyer and Sulcove, the salesman, called upon Polson at Hoquiam to effect a settlement, saw Shaw, Robert Polson and Alexander Polson, and were advised that Polson refused to take the steel for the reason that order was not procured in good faith (R. pp. 19-20), and during the trial President Polson, on cross-examination, said:

"Q. (By Mr. Roberts): You would not have taken it if you had known it was there?"

"A. If I had known it was shipped by Neumeyer & Dimond on this same order I would not have taken it, no sir." (R. p. 170.)

Mr. Bruener, counsel for the company, in his opening statement to the jury, said:

"That the steel was rejected at that time and it has always been rejected and has never been accepted by this company and that they deny liability for that steel."

Plaintiff in error before filing its answer made a motion to inspect the original and said in its motion:

"That defendant's defense will be a denial of the giving of the order, or of any order, in the form sued on, and that the signature of J. C. Shaw to an order was procured by trickery and fraud."

In all the correspondence and in all of the conversations regarding the refusal of the defendant to accept this shipment, the only grounds given were:

(1) That no contract existed.

(2) That the order was a forgery.

(3) That the order was procured by fraud.

(4) That Shaw had no authority to make purchases for defendant company, being a mere bookkeeper.

(5) That the sizes were not correct.

In all the correspondence and conversations

regarding the refusal to accept this shipment the lengths and weights were never disputed, although full and complete data was before Polson on February 18, 1913, down to the day of the trial and the steel was in the freight depot at Hoquiam after March 11, 1913, in part and the balance after May 14, 1914. (R. p. 64, Pl. Exs. No. 2, 11, 12, 13, Def. Exs. "E" and "F.")

On this state of facts the cause came on for trial on the 24th day of September, 1914. Defendants in error first placed upon the stand Shaw, who was alleged in the answer to be its bookkeeper, and without authority to buy for the corporation. (R. pp. 8-10.) Shaw testified that he was *not* the bookkeeper as alleged in the answer, and in fact testified that he *never* kept the books, and admitted that he purchased 95 per cent of all the material used by the company. (R. p. 28.)

On appeal this defense is waived.

Sulcove was next placed upon the stand. He testified to the manner in which the order was secured and to the signature of Shaw. (R. pp. 18-19.) Shaw, during the trial, admitted his signature. (R. p. 28.)

On the question of fraud the court said in his instructions to the jury:

"The court is not exactly clear what Mr. Shaw's position there is." (R. p. 24.)

On appeal the defense of fraud is abandoned.

Defendant in error next called William E. Neumeyer, who testified that for generations his family had manufactured steel in Germany and in the United States (R. p. 22); that his sales amounted to about $125,000.00 each year on the Pacific Coast (R. p. 24). He testified that in September, 1913, he had endeavored to reach an understanding with the Polsons about the steel; that they refused to discuss the matter with him, except to say the order was fraudulently procured (R. p. 22). He testified further that he had gone to the freight depot where the steel in question was in storage, talked to the freight agent, saw the bills of lading and the steel, and that the steel was shipped *exactly* in accordance with the order given by the company (R. p. 22). The bills of lading corroborated Mr. Neumeyer's testimony (Pl. Exs. 11 and 12).

The tabulations set forth in defendant's Exhibits "C" and "D" were made by its agents in September, 1914 (some two years after the order was given, and some eighteen months after delivery had been made), show that the shipment was twelve bars short and 2,645 pounds short. Over night

Neumeyer, by the greatest effort, procured invoices and shipping bills from Seattle (R. pp. 66-69; Pl. Ex. 12), and a telegram from the freight agent of the railway company at Hoquiam (this witness had testified for Polson the day before), stating and admitting that the twelve bars, weighing 2,645 pounds, had arrived and had been delivered on May 14th (Pl. Ex. 13).

On appeal plaintiff in error makes a *new* defense. It contends that each bar of steel, with the exception of the last item in the order, should be literally and exactly twenty feet long cut in two equal parts, that is, exactly ten feet long. It asserts that the evidence conclusively shows that (1) each bar of steel, with the one exception, should have been exactly ten feet long, and (2) that the bars were not ten feet long; that the law of the case requires a strict and literal performance of each term of the contract as a condition precedent to recovery, and, therefore, that the motion for a directed verdict should have been granted.

Secondly, it contends that the court's instructions were insufficient and inadequate, and that its requested instructions numbered three and six, to the effect that a strict and literal performance of the contract must be proved, should have been given.

The only evidence on this point was a colorable statement on the part of Sulcove, when, on cross-examination by counsel for Polson, speaking not of *all* the bars of steel but on the number of bars and lengths of Dog Hook steel, he said:

"Q. (Mr. Bruener) Twenty-five bars of 1x2 Dog Hook steel?

A. Yes, sir.

Q. That was given to you?

A. Yes, sir.

Q. All *those* bars were to be twenty feet long cut in two?

A. Yes, sir." (R. p. 20.)

On that little excerpt from the testimony given by the witness in a three-day trial Polson Co., disregarding the positive testimony of Neumeyer, the bills of lading, the invoices and its two years' silent acquiescence and the total absence of any evidence on its own part, contends that it is *conclusively* established that (1) each bar of steel should be exactly ten feet long, and (2) non-compliance.

ARGUMENT.

Motion for Judgment Notwithstanding the Verdict.

This motion was properly stricken. Such motion cannot lie in the Federal Court.

Slocum vs. New York Life Insurance Co., 228 U. S. 364.

Young vs. Central Railway Co. of New Jersey, 232 U. S. 602.

Also see:

Forsyth vs. Dow, 81 Wash. 137, 142 Pac. 490.

MOTION FOR NEW TRIAL.

The trial court is vested with discretion in granting or refusing a new trial. The ruling of the trial court in refusing a new trial will not be reviewed.

Ward vs. Joslin, 186 U. S. 142.

Tacoma Railway & Power Co. vs. Geiger, 145 Fed. 504.

In the last case the court said:

"That the refusal of the trial court to grant a new trial is not the subject of an assignment for error here has been decided too often to require a citation of the decisions."

MOTION FOR DIRECTED VERDICT.

The motion for a directed verdict was properly decided, the evidence being sufficient to constitute at least a *prima facie* case.

The Circuit Court of Appeals for the 6th Circuit in *McIntyre vs. Modern Woodmen of America,* 200 Fed. on p. 1, said:

"The rule is well settled that it is the duty of the court when a motion is made to direct a verdict to take that view of the evidence most favorable to the party against whom such instructions is asked (*Nelson vs. Ohio Cultivator Co.,* 108 Fed. 620-629, 112 C. C. A. 394, and cases cited) and that the mere fact that there is a preponderance of the evidence in favor of the party moving for the instructed verdict does not require the judge to take the case from the jury even though it might justify the granting of a new trial."

Rochford vs. Pennsylvania Company, 174 Fed. 81-83, 98 C. C. A. 105.

Hales vs. Michigan Central R. Co., 200 Fed. 533 (6th).

The Circuit Court of Appeals for the 8th Circuit, in *Liberty Bell Coal Mining Co. vs. Smuggler-Union Mining Co.,* 203 Fed. 795, said:

"To justify a court in withdrawing an issue from the jury it must appear that, giving the evidence the strongest probative force against the party asking for the withdrawal, there was no substantial evidence which would warrant a jury in finding that issue against him. It is only when all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the evidence on that issue, that it is the only duty of the court to withdraw it from the jury.

Railroad Company vs. Pollard, 22 Wall 341, 22 L. Ed. 877; *Grand Trunk R. R. Co. vs. Ives,* 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Texas & Pacific R. R. Co. vs. Gentry,* 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *St. Louis, Etc., R. R. Co. vs. Leftwich,* 117 Fed. 127, 129, 54 C. C. A. 1, 3; *Chicago, etc., Ry. Co. vs. Roddy,* 131 Fed. 712, 717, 65 C. C. A. 470, 475; *Insurance Co. vs. Hoover Distilling Co.,* 182 Fed. 590, 598, 105 C. C. A. 128 31 L. R. A. (N. S.) 873."

The Circuit Court of Appeals for the 4th Circuit, in *Norfolk, etc. Ry. Co. vs. Hauser,* 211 Fed. 567, said:

"At the close of the testimony it is the duty of the trial judge to direct a verdict wherever: First, the evidence is wholly undisputed, or, second, but one inference could be drawn from the evidence by reasonable men, so as that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it. *Patton vs. Texas & Pac. Ry. Co.,* 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Marande vs. Texas & Pac. Ry. Co.,* 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487."

"The test in the second class of cases is not how in the court's opinion the preponderance of the testimony may be, but whether it is adequate to go to the jury; that is, whether the evidence is sufficient upon which a jury might base an inference and if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. *Washington Gaslight Co. vs. Lansden,* 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; *Marande vs. Texas & Pac. Ry. Co.,* 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487."

"The jury is not to guess or conjecture as to possible explanations to account for a result, when such conjecture or explanation is not supported by any reasonable inference from the testimony in the case; but, when the cause of the occurrence cannot be shown by positive testimony, the jury is entitled to draw inferences from the circumstances contemporaneous with or surrounding the occurrence, and the only question is whether they afford any reasonable ground upon which a jury, in the exercise of its functions, can draw an inference. *Marande vs. Texas & Pac. Ry. Co.,* 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487; *Waters-Pierce Oil Co. vs. Deselms,* 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453."

"Cases are not lightly to be taken from the jury. Jurors are the recognized triers of questions of fact, and ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them, and parties are entitled to be secured in the enjoyment of their constitutional right to trial by jury, when the case is one proper to be decided by them, as one of fact and not to be concluded as a matter of law by the court. *Patton vs. Texas & Pac. Ry. Co.,* 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Marande vs. Texas & Pac. Ry. Co.,* 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487."

The Circuit Court of Appeals for the 3rd Circuit, in *United States vs. Erie Ry. Co.,* 212 Fed. 853, held:

"When the evidence given at the trial with all the inferences the jury could justifiably draw from it is insufficient to support a verdict for the plaintiff so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury but direct a verdict for the defendant."

The Circuit Court of Appeals for the 5th Circuit, in *Sloan et al. vs. Herndon et al.,* 213 Fed. 779, held:

"Upon this subject the Supreme Court, in the case of *Texas & Pac. Ry Co. vs. Cox,* 145 U. S. 606, 12 Sup. Ct., at p. 909, 36 L. Ed. 829, has announced the following rule:

'The case should not have been withdraw from the jury unless the conclusions followed as a matter of law that no recovery could be had upon any view which could be properly taken of the facts or the evidence tended to establish.' "

Dunlap vs. N. E. Railroad, 130 U. S. 649-652.

Cain vs. Michigan Central Ry., 128 U. S. 91.

Jones vs. E. Tennessee, Virginia & Georgia Ry., 128 U. S. 443.

McCallman vs. Illinois Central Railway Co. et al., 215 Fed. 465.

Also see the decision of the Circuit Court of Appeals for the Ninth Circuit in *Shank vs. Great Shoshone & Twin Falls Water Power Co.,* p. 836, 205 Fed. 833, on motion for non-suit.

"The rule adopted by this court, and indeed by most courts, is that where the minds of reasonable men may differ as to the legal sufficiency of the evidence, the jury, and not the court, must determine the issue."

Thoresen vs. St. Paul & Tacoma Lumber Co., 73 Wash. 99, 131 Pac. 645, 132 Pac. 860.

See also:

Atwood et al. vs. Washington Water Power Co., 79 Wash. 427, 148 Pac. 343 (1914).

Under the foregoing recent decisions it is very clear that the court properly denied the motion for a directed verdict.

Neumeyer's positive testimony that he had seen the steel in the freight depot at Hoquiam and that it was exactly in accordance with the order was sufficient to carry the question of fact to the jury.

There is not a syllable of evidence contradicting the testimony of Neumeyer, that the steel was there at the time delivery was made or shortly thereafter.

A tender was actually made when bills of lading and invoices were sent to plaintiff in error.

Concerning the *weight* to be given plaintiff in error's testimony the following considerations are pertinent:

(1) This testimony in its very nature is untrustworthy. The evidence in this case with the greatest aptness and force illustrates the danger of such evidence, to-wit:

Polson caused his agents to go to the freight depot in September, 1914, and count, weigh and measure certain steel and the said agents testified in court that the shipment was twelve bars short and 2,645 pounds short. The freight agent for the Northern Pacific corroborated the testimony of these agents and so the matter stood when court adjourned on the evening of September 25th, 1914. By extraordinary efforts Neumeyer was, over night, able to secure the admission by telegraph of this same freight agent of the Northern Pacific at Hoquiam that the said twelve bars, or 2,645 pounds, had actually been delivered in his freight depot and that said twelve bars had been taken away (Pl. Ex. 13). The shipping bills show the shipment of these twelve bars (Pl. Ex. 12, R. pp. 66-68).

It is our conclusion that defendants in error not only made a *prima facie* case on this question but that they established delivery by a preponderance of the evidence.

(2) Let us consider in detail the contention that each bar should have been exactly ten feet long. (1) Neumeyer's positive and uncontradicted testimony showed the goods were shipped *exactly* in accordance with the order given. (2) The invoices, appearing in evidence as defendant's Exhibits "E"

and "F," gave the quantities, sizes, description, weight, approximate weight per foot, approximate length and approximate length per bar of each and every bar of steel in the shipment and that invoice (Def. Ex. "F") was received *February 18th, 1913.* Polson made no objection whatsoever to the length of the bars of steel described in that invoice, or to the number of pounds of each bar. Defendant knew exactly what the shipment contained. Sulcove and Neumeyer called upon defendant in September, 1913, and no objection was made to the length or to the weight of the bars. *Not one word of objection was ever made to the length of the bars or the weight* of this shipment during the two years elapsing from the time the order was given until the trial. *This shipment never was refused or objected to on the ground of lengths or weights.* These facts are all established without contradiction. If the parties for two years dealt with one another, calling one another's attention to the length of these bars, and to their weight, without objecting or protesting in any manner the length or weight, one would think that there was a perfect and absolute agreement upon lengths and weights.

Counsel for plaintiffs in making the foregoing statements have not overlooked the fact that the

president of the Logging Company swore, "That his company first learned of any discrepancy in the number of bars and in the amount, character and description of the steel sent, with that specified in the order, was shortly before the trial, and after Mr. Mills and Mr. Flurshultz had measured and weighed the same." (R. p. 66.)

The law charges him with notice.

"As has been seen, the buyer has the right to inspect the goods and is then bound to accept them if they conform to the contract or to reject them if they do not. He is bound, however, to do one thing or the other, and within a reasonable time; and if he simply remains inactive, neither accepting or rejecting, within a reasonable period, the law will deem his inaction to be acquiescence and he will not afterwards be permitted to reject."

Meacham on Sales, Vol. II, Sec. 1380.

It appears in evidence, according to defendant's Exhibit "F," that the exact data was before Mr. Polson on February 18th, 1913 (R. p. 65) and all the steel was there after May 14, 1913, for his examination.

Plaintiff in error, to disprove the positive testimony of Mr. Neumeyer and to contradict the invoices, offered no evidence whatever at the trial.

They now seize upon the unadvised statement of Sulcove, taken from its natural setting, that each

bar should be twenty feet cut in two, and base this appeal thereon.

This, notwithstanding the invoice had been received by defendant, without objection, and acquiesced in for two years.

The court will note that the written contract does not specify the length of each bar. After listing some two hundred and ninety bars, the order provides that "bars twenty feet long cut in two at 12½c lb.," and then provides that certain bars of eight feet cost 17c per pound. The natural and logical conclusion from reading the order is that twenty foot lengths should sell for 12½c per pound and that the 8-foot bars should be 17c per pound. This is far from an effort to fix the length of each bar at twenty feet. Obviously, had the parties intended to contract for the exact length of each bar of steel they would not have said that each bar should be twenty feet long cut in two, or thirty feet cut in three or forty feet cut in four, but would have said each bar shall be ten feet long. The only logical inference to be drawn from the written contract is that all bars twenty feet or more in length should be cut in two, and so they were, and *the parties by their conduct and by their course of dealing have established the fact clearly and positively*

that these bars of steel should be of the class of twenty feet or more.

It is a striking fact that not one of the defendant's witnesses testified that each bar of steel should be ten feet long or literally twenty feet long cut in two, nor is there any evidence to show that a length of ten feet was given for the particular purposes of defendant's camp. Defendant makes no such contention. The record does not show that the length was at all material. This is not a case of the manufacture of structural steel to go into some great building where each bar must be of a certain and exact length to fit into the other part of the structure, but this steel was for the blacksmith shops operated by the defendant company in its several logging camps, and it was of no importance in the making of horse shoes, chocker-hooks, tools, etc., whether the steel was of certain fixed length—five, ten, twenty or thirty feet.

Read the testimony of Sulcove on pp. 20 and 21 of the record and note the pretext upon which counsel for Polson makes his contention as to the exact length of each bar. After referring to the number and sizes of other kinds of steel, counsel for defendant said:

"Q. (Mr. Bruener) Twenty-five bars 1x2 dog-hook steel?

A. Yes, sir.

Q. That was given to you?

A. Yes, sir.

Q. All of *those* bars were to be twenty feet long cut in two?

A. Yes, sir."

Sulcove was testifying about only a small number of the bars found in the order namely, the bars of dog-hook steel. Giving full force and credit to a literal interpretation of this testimony by Sulcove it establishes this: That the dog-hook steel should be ten feet long, or literally twenty feet cut in two. It is limited to dog-hook steel, and has no application to all the other bars of this shipment. It follows that there was a substantial compliance with the contract.

We repeat that on appeal Polson sets up a new and different defense.

If counsel went into this case to establish the defense that each bar of steel should be exactly ten feet long and intended to prove that fact, it seems to us that he would have directly, unmistakably and unequivocally placed that contention before the court and jury by no uncertain showing, and would

have offered evidence that *all* the bars were to be ten feet long, and he would have so stated to the jury in his opening statement. He would have placed witnesses from the camp upon the stand—the head machinist, the head carpenter, Shaw, the Polsons *et al.*—to prove that the bars of steel that they used and wanted in that camp were to be ten feet long and that the lengths specified in the order were ten foot lengths. He did nothing of the kind. He offered no proof at all.

In fairness to Sulcove he should have called his attention to the fact, if it be a fact, and not an afterthought upon the part of learned counsel in reading the record for the purposes of appeal and after he had failed in his defense, that this shipment was twelve bars short.

The fact is that any person having the order given in this case and answering counsel's question as worded by him would have answered just as Sulcove did, and would not have meant thereby that each bar of steel should be, literally, twenty feet long cut in two, but that bars should be of the class of twenty foot lengths, broken in two, and then not necessarily in equal lengths.

In addition, Sulcove's testimony is valueless. His testimony is the language of the written order

—word for word. Repetition is not explanation or interpretation.

That the length of the bars is absolutely immaterial is demonstrated:

(1) By the fact that no provision was made in the contract that each bar should be cut in *equal* parts. No evidence at the trial that each bar should be cut in two bars each ten feet long. No evidence at all as to the length of the parts.

(2) A total absence of evidence that a ten foot bar was either necessary or indispensable or important; that a difference of variation in any way defeated the objects which the parties intended to accomplish.

(3) No evidence that they even used such lengths in these camps.

See *Elliott on Contracts,* Vol. II, 912.

We say further that the corporation is estopped from raising this question of the length of the bars and their weight by its conduct during the two years of negotiation. It had a right to investigate this shipment upon delivery, and was duty bound to make an investigation; it had a full, complete and exact statement of all the lengths, sizes, quantities and weights of each and every bar on this shipment

in its possession from the 18th day of February, 1913, down to the day of trial, and *never* contended that these bars of steel should be ten feet long or literally twenty feet long cut in two; it went into the trial of this case contending that it had never ordered any steel from the plaintiffs in this case, that if any order was given it was procured by fraud, and was given by an agent without authority, finding fault only with the sizes; its president under oath said the company would not have taken the steel if it had all been there: these facts warrant an estoppel.

It says it would not have taken the steel if it had all been there! This refusal in open court, coupled with its two years of implied consent and its defeat on every outspoken and pleaded objection in the trial court, does not lend the color of good faith to the proposition now advanced in the appellate court.

Instructions to Jury.

No error is predicated upon the instructions given the jury. An assignment of error is based upon the refusal of the court to give requested instructions III and VI.

These instructions were refused for the reasons given by the court:

"THE COURT: The case is over. I will say, Mr. Bruener, I think I went over in my general instructions what you are entitled to in those two refusals." (R. p. 85.)

The court instructed the jury:

"It is alleged that on the date mentioned in this complaint that the defendant corporation gave the plaintiff an order for certain merchandise and that the plaintiff accepted the order and *filled it according to its terms* and that defendant has failed to abide by its terms and failed to pay the amount it agreed to pay when it gave the order." (R. p. 22.)

"Now, in this case, before the plaintiffs can recover they must show by a fair preponderance of the evidence that the contract they sue on was with the defendant; that they performed it and that the defendant has not performed it." (R. p. 73.)

"The burden of proof is upon the plaintiffs, as I pointed out to you, to show that the contract was made as they pleaded, and that it was performed by them, that is, they must, before they can recover in this suit, have furnished, as agreed by them when they accepted this order, *the kind, the amount* and the *description* of property included in the order for this merchandise; if they did not, they cannot prevail." (R. p. 78.)

"The burden is upon them (plaintiffs) to prove the contract, the terms thereof, the performance of the contract on their part and also that the goods delivered or tendered to the defendant complied with the contract." (R. p. 79.)

"If you further find that the plaintiffs delivered or tendered delivery of the steel called for by the

contract to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment thereof, then you will find for the plaintiffs for the amount agreed to be paid for said goods, * * * and I instruct you to make the defendant liable for said steel—the steel must correspond *in quantity* and *in kind* and *description* with that named in the order." (R. pp. 80-81.)

The foregoing instructions fairly presented to the jury the issue of delivery in accordance with the contract. The jury were told that Neumeyer & Dimond had alleged that they delivered the goods in compliance with the order and that to constitute a good delivery in law the shipment must correspond *in amount, in quantity, in kind and description with that named in the order.* That is a correct statement of law to which defendant has not excepted and in fact covers substantially all that is contained in the requested instructions which were refused. The trial court so informed counsel at the time. The fact that the court refused the instructions asked does not constitute error as long as the instructions given are correct statements of the law and cover the questions raised by the instructions refused. In other words, a requested instruction is properly refused when all its propositions have been embraced in the instructions given by the court.

Coffin vs. U. S., 162 U. S. 664.

Rio Grande R. R. Co. vs. Leak, 163 U. S. 280.

Agnew vs. U. S., 165 U. S. 36.

If the case is fairly put to the jury it is all that can reasonably be asked.

Ayres vs. Watson, 137 U. S. 584-601.

The refusal to give a requested instruction in the words of counsel is not error where the court embodies the substance of the instruction in his charge.

212 Fed. 69-75 (C. C. A. 8th).

The jury under these instructions found every fact against the corporation and that is the end of this litigation.

The instructions requested by the corporation were not correct statements of the law and were so erroneous that the court was precluded from giving them, for the following reasons:

(1) Both instructions assumed that the seller had failed to deliver the quantity specified or the lengths specified. The instructions should have included the clause *"If there was a failure";* otherwise the instructions assumed the very question of fact that the jury was called upon to decide.

2. The instructions assumed that each bar should be exactly twenty feet long cut in two—a disputed question of fact.

(3) The corporation was not entitled to an instruction that Neumeyer should deliver or tender delivery of the merchandise for the reason that by rejecting the shipment on certain stated grounds the corporation waived its right to object on other grounds. The question of waiver will be discussed later.

(4) The requested instructions numbered III and IV are based on the theory that a strict and literal compliance with a contract of this nature is required by law. This was undoubtedly the old common law rule, as plaintiff in error's brief shows, but the modern rule announced by recent decisions is that a *substantial compliance* is sufficient.

Such instructions as defendant proposed were expressly disapproved by the Court of Civil Appeals of Texas in *Richardson et al. vs. Herbert,* 135 S. W. 628, where the court held, in a suit for the recovery of the purchase price of a number of ties, that a substantial compliance with the terms of the contract was sufficient.

"The lower court charged the jury: 'That an exact compliance with the terms of the contract

either as to dimensions or the quality of ties is not required by the law as a condition of recovery of the contract price; if the dimensions and quality of the ties delivered be so near the specifications contained in the contract as to amount to a substantial compliance therewith, then the law is satisfied.' "

The court approved this instruction and said:

"Under the old rule of the common law a strict and literal performance of the terms of the contract was required as a condition precedent but a more liberal rule now prevails, and a recovery may be had if there has been *a substantial compliance with the contract.* If a contract is performed in good faith in all substantial particulars, the party so performing should recover the contract price, less any damages that may have accrued by reason of the deviation from the strict and literal terms of the contract."

"In the case of *Linch vs. Paris Lumber & Grain Elevator Co.,* 80 Tex. 23, 15 S. W. 209, which is cited by appellants in support of their proposition, the the court said: 'The objection to the part of the charge that instructs the jury that the evidence must show a substantial compliance of plaintiff with the terms of the contract rests upon the proposition that a literal performance was required in each and every particular. Such precision cannot, we think, be demanded in the performance of contracts or any other affair of life.' The court quotes with approval as follows from the New York case of *Smith vs. Gugerty,* 4 Barb (N. Y.) 620: 'If there is an honest effort to perform the contract according to the letter, and it is substantially fulfilled, the builder should be entitled to receive the reward of his labor, although he may not (as the architect employed in

this case has certified) have in every instance complied with its terms literally in every punctilio. A substantial compliance without any intentional variation should in all cases be considered as a full performance of a condition, whether precedent or subsequent.' The opinion in the Texas case was in regard to a charge similar in terms to the one in the case at bar, and is supported by the consensus of opinion in the United States. *Fitzgerald vs. La Porte,* 64 Ark. 34, 40 S. W. 261; *Hill vs. McKay,* 94 Cal. 5, 29 Pac. 406; *Aetna Works vs. Kossuth County,* 79 Iowa 40, 44 N. W. 215; *Hattin vs. Chase,* 88 Me. 237, 33 Atl. 989; *Phelps vs. Beebe,* 71 Mich. 554, 39 N. W. 761; *Leeds vs. Little,* 42 Minn. 414, 44 N. W. 309; *Crouch vs. Gutmann,* 134 N. Y. 45, 31 N. E. 271;, 30 Am. St. Rep. 608; *Moore vs. Carter,* 146 Pa. 492, 23 Atl. 243; *Meincke vs. Falk,* 61 Wis. 623, 21 N. W. 785, 50 Am. St. 157. Whether there has been a substantial performance of the terms of the contract is usually one of fact to be determined by a jury under the instructions of the court. *Linch vs. Lumber Co.* and *Crouch vs. Gutmann*, herein cited."

"The assignments attacking the charge are mostly based upon the question of a substantial compliance with the terms of the contract and as hereinbefore indicated cannot be sustained. *If a literal compliance with a contract to deliver lumber was required, every such contract would be destroyed. A literal compliance such as appellants demand would vitiate the contract* if a tie should fall short the hundredth part of an inch in dimensions, or if there was an infinitesimal portion more of sap than was specified in the contract. There is abundant testimony to show a substantial compliance with the contract, and the jury so decided. The question of performance was one of fact for the

jury. *Page on Contracts,* Secs. 1386-1388; *Phillip vs. Gallant,* 62 N. Y. 258; *Woodward vs. Fuller,* 80 N. Y. 312; *Drew vs. Goodhue,* 74 Vt. 436, 52 Atl. 971; *Charley vs. Potthoff,* 118 Wis. 436, 95 N. W. 124."

Instructions similar to those given by the court are set out as model instructions by *Brickwood Sackett on Instructions,* Vol. II, pp. 76, 77 and 78. These instructions were given by the court in *Strauss vs. National Paint Company,* 76 Miss. 343, 24 Southern 703.

The rule of substantial performance is the law of the State of Washington.

In *Taylor vs. Ewing,* 74 Wash. 214, 132 Pac. 1009 (1913), an agreement was entered into that Ewing would give his note for $4,500 in consideration of plaintiff securing assignments from the creditors of Ewing of their accounts, and that the bankruptcy proceedings would be dismissed, and Ewing given back his store. Plaintiff secured assignments from all the creditors aggregating $12,000, with the exception of two claims amounting to $366.67 and $40.29, the total indebtedness aggregating $12,000. The court said:

"Taking into consideration that there were more than forty merchandise creditors, located in numerous towns and cities, with claims aggregating a total of approximately $12,000, and that they were

all obtained and assigned with the exception of the two mentioned, we think there was a substantial compliance with the contract. The respondents are in no way prejudiced because two of the claims were not assigned before suit was instituted. Consequently they have no just ground to complain. In cases of this character the rule is that substantial performance is all that the law requires. The plaintiffs were, therefore, entitled to maintain their action. In 3 *Page on Contracts*, Sec. 1385, the rule is stated thus:

"'The original common-law rule required a strict and literal performance as a condition precedent to recovery. *The modern rule permits recovery without a strict and literal performance if there has been a substantial performance* and the contractor has attempted in good faith to perform the contract. If a contract has been performed substantially and deviations from the contract have been made, but not wilfully or in bad faith, the party so performing can recover the contract price, less the amount of such damage caused by such deviations. The amount of such damages is usually the expense of completion according to the contract.'

"See, also, to the same effect: *Drew vs. Goodhue*, 72 Vt. 426, 52 Atl. 971; *Morgan vs. Gamble,* 230 Pa. 165, 79 Atl. 410. Under the rule of these authorities, the right of the appellants to maintain the action is manifest."

Even in the case of sureties and guarantors in the State of Washington all that the law requires

is substantial compliance with the terms of the contract.

Noise vs. Adams, 76 Wash. 412, 136 Pac. 696.

Lazelle vs. Empire State Surety Co., 58 Wash. 589.

The Circuit Court of Appeals for the 9th Circuit has already held that substantial compliance with the contract is all that the law requires.

In *American Pacific Construction Co. vs. Modern Steel Co.,* 211 Fed. 849 (9th C. C. A.), the court said:

"A variance is suggested between the complaint and proofs in that the complaint alleges that the agreed amount of the steel to be delivered was 1,500 tons, and that there was no proof of any contract or agreement to deliver that amount. We have already seen that there was a valid contract entered into between these parties. The exact amount of steel in tonnage was not ascertainable until the steel was fabricated and weighed. There was ample proof tending to show that the amount would aggregate about 1,500 tons. Some witnesses thought it would be much less. But there is no room for saying that the proof in this respect is a departure from the allegations of the complaint. The objection is, therefore, without merit."

The United States Circuit Court of Appeals for the 2nd Circuit, in *Whitcomb vs. Shultz,* 215 Fed. 75 (1914), said:

"The material question was whether the vending company manufactured machines substantially like the model. If it did, it performed its contract. It was not responsible for the operation of the machines. This question was fully and fairly presented to the jury, who decided it in the plaintiff's favor upon a conflict of testimony and this finding is binding upon us."

The Circuit Court of Appeals for the 3rd Circuit, in *Pitcairn vs. Philip Hiss Co.,* 113 Fed. 492 (1902), an action brought for decorating, furnishing and refitting a house of the plaintiff, said:

"The defendant contended to the court and jury, as appears by the record, that, by reason of a defective construction of the woodwork in the daughter's room, there could be no recovery of the amount agreed to be paid to the plaintiff, under the contract for its furnishings and decoration; that the contract was an entire one, and, with this admittedly defective construction, there was not a substantial performance of the same.

"Whether this entire contract has been substantially performed was a question of fact for the jury. They might well be told that, in determining this question, they need not take into account any slight or unimportant defect, or one that could be easily remedied by a deduction from the agreed price, as such do not necessarily make it impossible to truthfully declare that an entire contract has been substantially performed; but whether such alleged defects are substantial or unimportant is a question of fact for the jury. Substantial performance of the entire contract is sufficient, and the jury may properly so find."

See:

German Savings Inst. vs. De La Vergen Refrigerating Co. et al., 70 Fed. 146.

In *Woodruff et al. vs. Hough et al.,* 91 U. S. 596, where the contract was entered into for the construction of a jail in accordance with the plans and specifications and the contractor agreed to make and erect all the wrought iron work according to said plans and specifications, Mr. Justice Miller said:

"It is conceded on the part of the plaintiffs that, in several important particulars this work is not in accordance with the plans and specifications, but it is also insisted that a literal compliance with the plans and specifications in those respects is practically impossible.

"The court repeated the details of the contract on the points where the failure was alleged, and then told the jury that unless the contractors had *complied substantially with these specifications, or a strict compliance therewith had been waived,* they could not recover. The charge was very full and covered the whole ground necessary to enable the jury to apply the law to the matters in issue. We do not find in it any error.

"The fact that Allen will, under the judgment recovered by defendants in error, taken in connection with the amount he has to pay to others to complete the wrought-iron work, be a loser to the amount of several thousand dollars, does not prove the instruction of the court to be wrong. If there

was any error, it was committed by the jury, and not by the court. It is only another one of those cases, so common from that circuit, in which, with the whole charge of the court and much of the testimony in the bill of exceptions, this court is expected to retry the case as if it were both court and jury. Our repeated refusal to do this will be adhered to, however counsel may continue to press on our attention the mistakes of juries. They are beyond our jurisdiction."

The case at bar is within the rule laid down by the United States Supreme Court in the case above under both alternatives:

1. Substantial compliance.
2. Strict compliance waived.

Waiver.

I.

Defendant waived its right to defend on the ground that there was a variation in quantities by denying the existence of the contract and any liability thereunder.

In *Meincke vs. Falk,* 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157, the parties contracted for a carriage according to a certain model selected. The carriage furnished was substantially a duplicate of the model and the court held that this was sufficient compliance with the contract. Then the court said:

"Besides it must be borne in mind that the defendant did not refuse to accept the carriage because it was not such as was ordered; but the refusal to accept was placed upon the distinct ground that no legal contract had ever been made to purchase the carriage. The case was litigated upon this ground alone, as the elaborate opinion of Mr. Justice Cassoday on the former appeals shows. See 55 Wis. 427, 42 Am. Rep. 722. Now the defendant seeks to change his position and justify the refusal to accept on the ground that the carriage tendered was not such as was ordered; that it did not comply with the contract. This objection, at this late day, comes with bad grace, and is hardly consistent with the rules of good faith and honest dealing. The defendant should have said, when the carriage was finished and he was called upon to take it, that it was not such a carriage as he had contracted for—that it was not like the Ball carriage, and objected to receiving it on that ground. But this he did not do. The refusal to accept was placed upon the ground that he never bought the carriage and did not want it. This furnishes an additional reason for submitting the case to the jury upon the evidence given on the trial."

In the Federal Circuit Court for Missouri in *Davis & Ramik Building & Mfg. Company vs. Dix,* 64 Fed. 406, the court approved the *Meincke* case and stated:

"It was but following up this sound rule of commercial honesty that the Supreme Court, in *Railway Company vs. McCarthy,* 96 U. S. 258, held that if one party gives a reason for his conduct and decision touching anything involved in a controversy he is estopped after litigation has begun from

changing his ground and putting his conduct upon another and different consideration."

II.

The Supreme Court of the State of Washington in *Zeimantaz vs. Blake,* 39 Wash. 6, held:

"It is complained in this connection that the tenders were insufficient, but we think the appellant is estopped to complain of this. Had he refused to perform the contract because he had not been tendered payment in full, and appeared in the action and defended on that ground, he probably could have succeeded in defeating a recovery of costs against him, if his contention should have proven true, though not the performance of the contract. But the appellant did not object to the tender when made on the ground that enough was not tendered him, nor did he defend this action on that ground. *He denied any liability whatsoever under the contract, and it is on that ground that he must succeed now, if he succeeds at all.*

The Supreme Court of the United States has held that a tender of performance is unnecessary where it appears that it would not have been accepted or it is reasonably certain that it would have been refused.

In *Hills vs. Exchange Bank,* 105 U. S. 319, the court said:

"That question is, whether the fact clearly established that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that

when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. *Bennett vs. Hunter,* 9 Wall. 326; *Tacey vs. Irwin,* 18 *id.* 549; *Atwood vs. Weems,* 99 U. S. 183."

The principle announced in the foregoing case was reaffirmed in *United States vs. Lee,* 106 U. S. 196, and again in *United States vs. Edmondston,* 181 U. S. 500, p. 588.

Whitcomb vs. Shultz, 215 Fed. 75 (C. C. A. 2nd, 1914).

Allegheny Valley Brick Co. vs. C. W. Raymond Co., 219 Fed. 477 (2 C. C. A.).

The Supreme Court of the State of Washington:

Ward vs. Thorndyke et al., 65 Wash. 11 (1911), 117 Pac. 593, suit was brought to foreclose a mechanic's lien, plaintiff claiming that the parties had agreed that the work should be paid for $200 cash and the balance by sixty-day note. Respondent claimed that the agreement was that one-half should

be paid cash and the balance in a ninety-day note. The court said:

"No formal tender of the note was necessary, since Ward's testimony shows that any such tender would have been refused."

Windeberg vs. Naher, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956.

Griesemer vs. Mutual Life Insurance Co., 10 Wash. 202, 38 Pac. 1031.

Lawson vs. Sprague, 51 Wash. 286, 98 Pac. 737.

Clizer vs. Krauss, 57 Wash. 25, 106 Pac. 145.

Bruggeman vs. Converse, 47 Wash. 581, 92 Pac. 429.

Welsh vs. Caton, 53 Wash. 309, 101 Pac. 1085.

"No tender is necessary if the contract has been repudiated by the buyer as by refusal to accept delivery tendered or notice to the seller that the buyer is unable to accept and pay for the goods."

35 *Cyc.* 171.

Gibbons vs. U. S., 8 Wallace, 269.

Mattock vs. Young, 66 Me. 469.

Blair vs. Hamilton, 48 Ind. 32.

Duffy vs. Patton, 74 Me. 390.

Koon vs. Snodgrass, 88 West Va. 320.

Wallace vs. Hill, 93 N. Y. 576.

Holmes vs. Holmes, 9 N. Y. 529.

Smith vs. Poilou, 87 N. Y. 594.

McPherson vs. Walker, 40 Ill. 371.

Loftus vs. Riley, 83 Iowa 503.

Grant vs. Penbery, 15 Kan. 236.

Roberts vs. Mazeepa Mill Co., 30 Minn. 413, 15 N. W. 680.

Lapham vs. Bossemeyer, 5 Neb. 343, 98 N. W. 699.

Windmiller vs. Pop, 107 N. Y. 674, 14 N. E. 436.

Calhoun vs. Vechio, 4 Fed. cases, No. 2310.

Beasley vs. Lovel, 2 Ohio Dec. 378.

Van Sickle vs. Nester, 34 Hun. 64.

Kily vs. Lee Canning Co., 105 N. Y. App. Div. 633, 93 N. Y. Supp. 986.

"It is a maxim that the law does not require a man to do a vain and fruitless thing. It has been held that a strict and formal tender is not necessary where it appears that if made it would

have been vain and fruitless. The rule may be stated as follows:

"An actual tender of performance may be excused when there is readiness and ability to perform, and actual performance has been prevented or waived by the party to whom performance is due."

Elliott on Contracts, Sec. 1972.

When it is clear that a tender will not be accepted it need not be made. Thus a tender to one who announces in advance that he will not accept it is unnecessary. Accordingly where the purchaser of goods in advance of their delivery refuses to accept them the tender of the goods need not be made.

28 *Am. & Eng. Encyc. of Law,* 7.

Tender of performance by one party to a contract is not necessary where the other party absolutely repudiates the contract by denying its existence or by denying his liability under the contract.

28 *Am. & Eng. Encyc. of Law,* 8.

III.

DEFENDANT ALSO WAIVED ANY OBJECTION TO VARIATIONS IN QUANTITY

OF THE SHIPMENT BY REJECTING SAME ON OTHER GROUNDS.

"Where a tender is refused not on the ground of the amount being too small, but on some other ground, the objection to the deficiency of the amount is waived."

28 *Am. & Eng. Encyc. of Law,* 18.

The Supreme Court of the State of Washington has held that objection on one ground is a waiver of defense on other grounds.

In *Gottschalk vs. Meisenheimer,* 62 Wash. 299, 113 Pac. 756, the holding was that "the refusal of a tender on the ground that it was not made in time precludes the party from subsequently objecting that it is not sufficient in amount." (Syllabus.)

Hidden vs. German Savings Bank & Loan Assn., 48 Wash. 384.

Loverditz vs. Commonwealth Ins. Co., 57 Wash. 376, 106 Pac. 1122.

Keene vs. Zindorf, 81 Wash. ...., 142 Pac. 484.

The rule is well established that a purchaser of goods who refuses to accept them on a particular ground thereby waives other objections which he might have urged for such refusal.

Oakland Sugar Mill Co. vs. Fred W. Wolf Co., 118 Fed. 239 (2nd C. C. A.).

Braithwaite vs. Foreign Hardwood Co., 2 K. B. 543.

Levy vs. Treen, 1 El. & El. 969, 102 E. C. L. 969.

Peterson vs. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

Montgomery vs. Thompson, 152 Cal. 697, 92 Pac. 866.

Hill vs. Fruits Mercantile Co., 42 Colo. 491, 94 Pac. 354, 126 Am. St. Rep. 172.

Olcese vs. Mobile Fruit etc. Co., 112 Ill. App. 281, affirmed 211 Ill. 539, 71 N. E. 1084.

Baird vs. Pratt, 6 Ind. Ter. 38, 89 S. W. 648.

Sutton vs. Risser, 104 Ia. 631, 74 N. W. 23.

Bonney vs. Blaidsdell, 105 Me. 121, 73 Atl. 811.

Corcoran vs. Henshaw, 8 Gray, 267.

Ginn vs. W. C. Clark Coal Co., 143 Mich. 84, 106 N. W. 867, 107 N. W. 907.

Nass vs. Welter, 92 Minn. 404, 100 N. W. 211.

Parkins vs. Missouri Pac. R. Co., 72 Neb. 831, 101 N. W. 1013.

Bryant vs. Thesing, 46 Neb. 244, 64 N. W. 967.

Hayden vs. Demets, 53 N. Y. 426.

Smith vs. Pettee, 70 N. Y. 188, 53 N. E. 810.

Gould vs. Banks, 8 Wend. 563, 24 Am. Dec. 90.

Drucklieb vs. Universal Tobacco Co., 106 App. Div. 470, 94 N. Y. S. 777.

Hess vs. Kaufherr, 128 App. Div. 526, 112 N. Y. S. 832; see also *John vs. Oppenheim,* 55 N. Y. S. 280.

Hill vs. Heller, 27 Hun. 416.

O'Donohue vs. Leggett, 55 Hun. 607, 8 N. Y. S. 426, affirmed 134 N. Y. 40, 31 N. E. 269.

Manda vs. Etienne, 93 App. Div. 609, 87 N. Y. S. 588.

United Fruit Co. vs. Bisese, 25 Pa. Super. Ct. 170.

Kelley vs. Berry, 39 Wis. 669.

Meincke vs. Falk, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157.

In the case first cited the purchaser made a number of objections to the work performed by the contractor. Some of which were remedied and others were disputed. After suit had been commenced new objections were made to the work. The Circuit Court of Appeals (2nd) said:

"To permit the purchaser under such circumstances to change the issues and propound new defenses, presumably waived, without offering to show that it had been misled by the conduct of the contractors or that the defect since discovered were latent, would be contrary to well-settled principles of estoppel. *Littlejohn vs. Shaw,* 159 N. Y. 188, 53 N. E. 810; *Railway Co. vs. McCarthy,* 96 U. S. 258, 24 L. Ed. 693; *Carleton vs. Jenks,* 26 C. C. A. 265, 80 Fed. 937; *Davis vs. Wakelee,* 156 U. S. 680-690, 15 Sup. Ct. 555, 39 L. Ed. 578; *Gingrass vs. Iron Cliffs Co.,* 48 Mich. 413, 12 N. W. 633; *Gould vs. Banks,* 8 Wend. 562, 24 Am. Dec. 90; *Manufacturing Co. vs. Allen,* 53 N. Y. 515, 519.

"In *Railway Co. vs. McCarthy,* cited above, Mr. Justice Swayne, speaking for the court, thus stated the principle upon which the ruling of the court below was predicated:

" 'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.'

"*Gould vs. Banks,* 8 Wend. 562, 24 Am. Dec. 90; *Holbrook vs. Wright,* 24 Wend. 169, 35 Am. Dec.

607; *Everett vs. Saltus,* 15 Wend. 474; *Wright vs. Reed,* 3 Term. R. 554; *Duffy vs. O'Donovan,* 46 N. Y. 223; *Winter vs. Coit,* 7 N. Y. 288, 57 Am. Dec. 522.

"In *Littlejohn vs. Shaw,* cited above, the action was upon a contract of sale of gambier. The defendant had rejected the article delivered upon two specific grounds. The contention was that it was a condition precedent to recovery that the plaintiff should affirmatively prove that all the terms of the contract had been fulfilled on his part, and that a failure in any point was fatal to the action. After observing that the general rule was that it devolved upon a plaintiff to show performance of all essential stipulations of a contract sued upon, the New York Court of Appeals said:

" 'But in this case the defendants placed their rejection of the gambier upon two specific grounds, viz., that it was not of good merchantable quality, and that it was not in good merchantable condition. By thus formally stating their objections, they must be held to have waived all other objections. *The principle is plain, and needs no argument in support of it, that if a particular objection is taken to the performance, and the party is silent as to all others, they are deemed to be waived.* This waiver of all other objections is not only justly inferable generally, but is especially so when, as under the circumstances present in this case, the deliberateness with which the objections are stated leaves it to be implied and there has been a consideration of the matter of acceptance of the goods and a result reached upon particular grounds. The defendants, therefore, were not in a position to insist upon any other proof of the plaintiffs to enable them to recover upon their right of action, than that the

gambier was of good merchantable quality and in good merchantable condition.' "

In England the rule is the same.

Braithwaite vs. Foreign Hardware Company, supra.

It appeared that defendants repudiated a contract for the purchase of lumber on the ground that the plaintiff committed a breach of the contract by selling similar lumber to other parties and defendants refused to accept lumber upon this basis. It was held that defendant had waived every right to object to the tender of the lumber on the subsequently discovered ground that a portion of it was of inferior quality.

The Supreme Court of Michigan, in *Ginn et al. vs. Clarke Coal Company,* 143 Mich. 84, 106 N. W. 867, 107 N. W. 904, said:

"Defendant complaint because the trial court excluded certain testimony offered by it for the purpose of proving that the coal rejected was not of a merchantable quality. The trial court had a right to understand that defendant sought to introduce this testimony not for the purpose of reducing damages, but solely for the purpose of justifying its rejection of the coal. As this court reviews upon writs of error only questions raised in the trial court, the question for our determination is: Was this testimony admissible to justify the rejection

of the coal? Defendant, after having a full opportunity to examine the coal, notified plaintiff that they rejected the same for a certain specific ground, viz., the coal was not Pine Grove coal. Plaintiffs had a right to act upon the assumption that this was the only ground upon which defendant relied, and it would be unjust to permit defendant to rely upon other grounds on the trial of this case. This precise question was determined in *Littlejohn vs. Shaw,* 159 N. Y. 189, 53 N. E. 810."

The Supreme Court of Iowa, in *Sutton vs. Risser,* 104 Iowa 631, 74 N. W. 23, said:

"Where a buyer refused to accept goods on account of their quality, he cannot thereafter justify such refusal by alleging a shortage which the seller had offered to correct." (Syllabus.)

In Pennsylvania the court held that a refusal to accept fruit on the ground that it was frozen on arrival was a waiver of objection that the quantity was not that ordered.

United Fruit Co. vs. Bissese, 25 Pa. Superior Court, 170.

The Supreme Court of Minnesota, in *Lathrop vs. O'Brien,* 37 Minn. 175, 59 N. W. 413, said:

"It is also undisputed that at the time the deeds were tendered the objection that the patents had not been recorded, and no money tendered to pay for recording them, was neither made nor suggested. Conceding, for the sake of argument, that the tender was insufficient for the reasons stated, yet, the defendant having placed his refusal solely on a certain

other specified objection, is precluded from now raising another objection trifling in its character, and which, if made at the time, could have easily been remedied by plaintiff.

"But, however this may be, upon the facts proved and found defendant must be held to have waived the objections to the tender he urges."

In *Ricketts vs. Buckstaff,* 90 N. W. 915, the Nebraska court said:

"The defendants now object to some of the tenders on the ground that they were made by check and were not unconditional. No such objection was urged against the tenders when made. They were objected to on the sole ground that under the construction placed upon the contract by the defendants hereinbefore mentioned the amount tendered was insufficient. It is well settled that where a tender is rejected on one ground other objections thereto are waived."

Again the Nebraska Court said, in *Parkins vs. Missouri Pacific Railway Co.,* 72 Neb. 831, 101 N. W. 1013:

"The defendant, of course, could not during all the time the question of receiving the gravel was pending lead the plaintiff to believe that in the judgment of the superintendent the gravel was suitable by raising other objections and giving other reasons for not receiving it, and, not having at any time notified the plaintiff that the gravel was unsuitable, defend upon that ground when sued. This would be the rule even though the fact were that the gravel was unsuitable for the uses for which the defendant desired it."

The Court of Appeals of New York, in *Hayden vs. Demets,* 53 N. Y. 426, held that a refusal to accept goods on the ground of inability to pay was a waiver of the objection that the amount was too small.

And in a note to the case of *Bundy vs. Wells et al.,* 88 Neb. 554, 130 N. W. 273, found in Volume 23, *Am. & Eng. Ann. Cases,* on page 903, it is said:

"All the authorities support the rule announced in the reported case that where a tender is refused without objection to the sufficiency of the amount, the objection being based on other grounds, the amount cannot afterwards be questioned."

Cases are cited from twenty-one states.

"One of the most common ways in which a waiver will be deemed to have been made is by objecting to the tender on a certain specific ground other than that for which it might otherwise have been held sufficient. Thus, where a tender is refused without objection to the sufficiency of the amount, but on other grounds, objections to the amount of the tender will be considered waived. So, a refusal of a tender based on the insufficiency of the amount, or some other objection rather than the medium, waives objection that the tender is not made in a proper manner. So, objection to the time or place of tender are similarly waived by failing to object on these grounds and specifically objecting on other grounds."

Elliott on Contracts, Vol. 3, Sec. 1971, p. 128.

"So, objections on account of the tender of too much, or too little, or at a time or place other than that at which it may have been required to be made, may be waived in the same way or by the failure to object on the grounds of the insufficiency of the tender for such reasons."

Elliott on Contracts, Vol. 3, p. 126, Sec. 1970.

Common honesty among business men and the maintenance of justice in the courts will not permit the parties in their dealings to take one position during the course of their transactions and a different position when the matter comes on for trial before a jury. This principle is clearly established by the decisions set out hereinabove.

According to Polson the shipment was twelve bars short and 2,645 pounds short. It had proved this by four witnesses who had actually handled the steel and had produced the agent of the Northern Pacific Railway Company at Hoquiam to corroborate the same. And so the case stood at the close of the second day of the trial. It is not necessary to comment to the court on the surprise with which Neumeyer and his counsel heard objections to this testimony. But this so-called defense crumbled and reacted upon its defenders when the following morning counsel for Neumeyer, by great effort and

unusual good fortune, were able to secure an admission by telegraph from the agent of the Northern Pacific at Hoquiam, who had testified for defendant the afternoon before, that these twelve bars or 2,645 pounds shortage had actually been received and had actually been taken away by a transfer company. Counsel believed then, and subsequent investigation justifies their belief, that Polson had not only made a sham and fraudulent defense when it pleaded that Shaw was its bookkeeper and not its buyer, and that the order had been taken fraudulently, but also that this company had upon the witness stand continued its fraudulent efforts to rob the plaintiffs of their just verdict, not only to defeat them in their action for the price of this steel, but to take twelve bars and 2,645 pounds scot free without the payment of a single penny. Could any court of justice in the United States, high or low, under the disclosures in this case, grant a motion for a directed verdict if there was any evidence of any kind—however slight and frail—deny the plaintiffs their verdict and judgment, and give to the defendant without charge a considerable portion of this merchandise?

Finally, we believe the question of non-delivery or non-performance because of alleged varia-

tions in quantities was waived and therefore was not an issue. If not an issue, it follows, of course, there is no basis for a motion for a directed verdict, no basis for an assignment of error on the instructions refused; if an issue, then the jury decided the disputed question of fact against defendant under proper instructions.

No error having been committed, and a fair trial having been given to the defendant, the judgment should be affirmed.

Respectfully submitted,

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